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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JONATHON PERRY-HUDSON, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

TWILIO INC.,

Defendant.

Case No. 3:24-cv-03741-VC

**DEFENDANT TWILIO INC.'S NOTICE
OF MOTION AND MOTION TO
COMPEL INDIVIDUAL ARBITRATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Pursuant to Fed. Arb. Act., 9 U.S.C. § 4

Date: November 21, 2024
Time: 10:00 a.m.
Courtroom: 4 — 17th Floor
Judge: Hon. Vince Chhabria

Date Filed: June 21, 2024

Trial Date: Not Yet Set

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1 **TWILIO'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION**
2 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** on November 21, 2024 at 10:00 a.m., or as soon
4 thereafter as counsel may be heard, before the Honorable Vince Chhabria in Courtroom 4, on the
5 17th Floor of the Phillip Burton Federal Building and U.S. Courthouse, 450 Golden Gate Avenue,
6 San Francisco, California, 94102, Defendant Twilio Inc. ("Twilio") will and hereby does move to
7 compel this action to individual arbitration and stay this action pending resolution of arbitration.

8 Twilio moves to compel individual arbitration pursuant to Section 4 of the Federal
9 Arbitration Act, 9 U.S.C. § 4. Plaintiff entered into a valid and enforceable arbitration agreement
10 with non-party Thirty Madison, Inc. (doing business as "Keeps") when he made a purchase on the
11 Keeps website and agreed to the Keeps Terms & Conditions. That arbitration agreement covers
12 Plaintiff's claims in this action. And that agreement contains a class action waiver that precludes
13 any class action claims. Twilio is entitled to enforce Plaintiff's arbitration agreement and class
14 action waiver with Keeps under the California doctrine of equitable estoppel. Plaintiff's claims
15 should thus be compelled to individual arbitration. Further, pursuant to Section 3 of the Federal
16 Arbitration Act, 9 U.S.C. § 3, this action should be stayed pending resolution of that arbitration.

17 This motion is based on this notice of motion and motion, the following memorandum of
18 points and authorities, the supporting declarations of Olivia Jahn and Ian Kanig and the exhibits
19 attached thereto, and the pleadings, records, and other papers on file in this action, as well as any
20 further briefing, evidence, or argument that may be presented to the Court.

21
22 Dated: August 19, 2024

KEKER, VAN NEST & PETERS LLP

23
24 By: /s/ Ian Kanig
25 BENJAMIN BERKOWITZ
26 CHRISTINA LEE
27 IAN KANIG

28
29 Attorneys for Defendant
30 TWILIO INC.

1 **I. INTRODUCTION**

2 Defendant Twilio Inc. respectfully moves to compel Plaintiff Jonathon Perry-Hudson's
3 claims in this action to individual arbitration. Plaintiff alleges that Keeps, a company that offers
4 men's hair loss treatments, used Twilio's customer engagement software to collect information
5 about a purchase he made on the Keeps website, build a customer profile about him, and send him
6 internet ads related to hair loss treatments. Dkt. No. 1 ("Compl.") ¶¶ 5–7, 27–51.¹ Keeps's
7 Privacy Policy informs its customers that it "may [] share your Personal Information with entities
8 that assist us with marketing and advertising" and that "ad networks to which we belong may use
9 your browsing activity . . . to show you interest-based advertisements." Declaration of Ian Kanig
10 ("Kanig Decl.") ¶ 2 & Ex. A–C ("Keeps Privacy Policy") ¶ 8. Nevertheless, Plaintiff alleges that
11 Keeps never disclosed it may share his information with third parties like Twilio, and that Keeps
12 colluded with Twilio to secretly collect and use his information for marketing and advertising
13 purposes. Compl. ¶ 56. But he has not sued Keeps in any forum. Declaration of Olivia Jahn
14 ("Jahn Decl.") ¶ 4. Instead, he now asserts privacy claims under California law **against Twilio**.

15 The reason why Plaintiff did not sue Keeps is likely found in his agreement with Keeps,
16 which requires him to individually arbitrate any claims against Keeps under New York law. *See*
17 *id.* ¶¶ 2–3; Kanig Decl. ¶¶ 5–6 & Exs. D & E ("Keeps Terms") ¶¶ 17–18 (the Terms cover "[a]ny
18 dispute, claim, or controversy arising out of or relating in any way to [the] Terms," including
19 "enforcement, interpretation or validity thereof," and "your use of the [Keeps] Site"). It appears
20 that Plaintiff believes, by suing Twilio only, he can avoid his arbitration agreement with Keeps
21 and assert, on behalf of a putative class, California law claims that are otherwise unavailable.

22 Plaintiff is wrong. Twilio is entitled to enforce Plaintiff's arbitration agreement with
23 Keeps under the well-established doctrine of equitable estoppel. Equitable estoppel permits a
24 nonsignatory defendant to compel a signatory plaintiff to arbitration: (1) "when the claims against
25 the nonsignatory are intimately founded in and intertwined with the underlying contract"; or (2)
26 "when the signatory alleges substantially interdependent and concerted misconduct by the

27
28 ¹ Keeps is a DBA of non-party Thirty Madison, Inc., which operates several telehealth brands.
 To maintain consistency with Plaintiff's complaint, Twilio refers to Thirty Madison as Keeps.

1 nonsignatory and another signatory and the allegations of interdependent misconduct are founded
2 in or intimately connected with the obligations of the underlying agreement.” *Herrera v. Cathay*
3 *Pac. Airways Ltd.*, 104 F.4th 707, 711 (9th Cir. 2024). Both circumstances are present here.

4 **First**, Plaintiff’s privacy claims against Twilio are “intimately founded in and intertwined
5 with” the privacy rights and obligations that are set out in his agreement with Keeps. In support
6 of his claims under the California Invasion of Privacy Act (“CIPA”) and for invasion of privacy
7 under the California Constitution and common law, Plaintiff must plead and prove that Keeps did
8 not disclose it could share his customer information with third-party software vendors like Twilio.
9 *See Hammerling v. Google, LLC*, No. 22-17024, 2024 WL 937247, at *3 (9th Cir. Mar. 5, 2024)
10 (the disclosure of a challenged data practice defeats California invasion of privacy claims as a
11 matter of law); *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 828 (N.D. Cal. 2020)
12 (same for CIPA claims); *see also* Compl. ¶¶ 6, 76, 86, 89 (alleging that no disclosure occurred in
13 support of each of his claims). Determining the adequacy of Keeps’s disclosures requires this
14 Court to interpret and enforce the Keeps Privacy Policy to which Plaintiff agreed. That is
15 precisely the type of intertwinement that warrants equitable estoppel. *Hunt v. Meta Platforms,*
16 *Inc.*, — F. Supp. 3d —, 2024 WL 2503118, at *2 (N.D. Cal. May 24, 2024).

17 **Second**, Plaintiff also alleges “substantially interdependent and concerted misconduct”
18 between Keeps and Twilio that is similarly “founded in or intimately connected with” the privacy
19 rights and obligations set out in the Keeps Privacy Policy. Plaintiff’s theory is that Keeps and
20 Twilio unlawfully colluded to collect and use his customer information for their mutual profit.
21 Compl. ¶¶ 27–51, 56. Because these allegations of concerted misconduct between Keeps and
22 Twilio also turn on whether Keeps disclosed that it may share customer information with its third-
23 party vendors, equitable estoppel is also warranted on these grounds. *See Salas v. Universal*
24 *Credit Servs., LLC*, No. 17-CV-2352 JLS, 2019 WL 1242448, at *4 (S.D. Cal. Mar. 18, 2019).

25 Ultimately, “[t]he ‘linchpin’ of equitable estoppel is fairness.” *Herrera*, 104 F.4th at 710.
26 And it is unfair for Plaintiff, who agreed that New York law would decide questions about his
27 Keeps contract in individual arbitration, to ask this Court to define the boundaries of that contract
28 under California law in a class action against its software vendor Twilio. As this Court explained,

1 “Think of it this way: [the signatory plaintiff] could have also sued [the signatory] on essentially
2 the same set of allegations. And had she done so, the arbitration agreement would no doubt
3 apply. Equitable estoppel prevents [the plaintiff] from sidestepping that agreement by bringing
4 claims only against [the nonsignatory defendant] instead.” *Young v. ByteDance Inc.*, 700 F.
5 Supp. 3d 808, 814, (N.D. Cal. 2023); *see also Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867,
6 875 (9th Cir. 2021) (adopting the argument that it is “a quite obvious, if not blatant, attempt to
7 bypass [an] agreement’s arbitration clause” to sue only a nonsignatory).

8 Twilio thus respectfully requests that this Court compel arbitration and stay this action.

9 **II. BACKGROUND**

10 **A. Plaintiff purchased a men’s hair loss treatment from the Keeps website and
11 agreed to individually arbitrate any related claims under New York law.**

12 Plaintiff alleges that he visited the Keeps website in early May 2024 to purchase a men’s
13 hair loss treatment. Compl. ¶ 5. To make that purchase, Plaintiff created an account with Keeps.
14 Jahn Decl. ¶ 2. And to create that account, Plaintiff was required to agree—and did agree—to the
15 Keeps Terms & Conditions and the Keeps Privacy Policy that they incorporated. *See id.* ¶ 3; *see*
16 *also* Kanig Decl., Exs. A–C (Keeps Privacy Policy) & Exs. D–E (Keeps Terms),

17 The Keeps Terms include an arbitration provision and class action waiver. Kanig Decl.,
18 Exs. D–E ¶¶ 17–18. They cover “[a]ny dispute, claim, or controversy arising out of or relating in
19 any way to these Terms; the breach, termination, enforcement, interpretation or validity thereof,
20 including the determination of the scope or applicability of this agreement to arbitrate; or your use
21 of the Site, including products purchased or Service rendered through the Site. . . .” *Id.* ¶ 17. In
22 agreeing to submit these disputes to arbitration, signatories expressly agree to “waiv[e] the right
23 to a trial by jury or to participate in a class action.” *Id.* The Keeps Terms specify that “the U.S.
24 Federal Arbitration Act [“FAA”] governs the interpretation and enforcement of this provision,”
25 and that the procedural rules of arbitration are supplied by the American Arbitration Association’s
26 Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes
27 (“AAA Rules”). *Id.* And, in any arbitration or action brought under this agreement, “the statutes
28 and laws of the United States and the state of New York, USA, without regard to conflicts of laws

1 principles, will apply to all matters relating to use of this Site or use of the Service.” *Id.* ¶ 16.

2 **B. Plaintiff alleges that Keeps secretly shared his information with Twilio and**
3 **asserts class action privacy claims under California law against Twilio alone.**

4 Plaintiff alleges that, sometime after his Keeps purchase, he began to see internet ads for
5 men’s hair loss treatments on Facebook and other websites. Compl. ¶ 7. Plaintiff insinuates that
6 he saw those ads because Keeps secretly installed Twilio’s customer engagement software on its
7 website to collect information about its customers, build profiles about them, and deliver internet
8 ads about its products through its advertising partners. *Id.* ¶¶ 27–51. He alleges that “Keeps.com
9 utilizes [Twilio’s] Segment API on its Website and sends its consumers’ [personal information] to
10 Twilio in order to assist with Keeps’[s] [sic] marketing, advertising, and analytics efforts.” *Id.* ¶
11 29. Twilio’s software “creates unified customer profiles” that “merges the complete history of
12 each customer into a single profile, no matter where they interact with your business.” *Id.* ¶¶ 30–
13 31. Keeps then uses these profiles for “targeted marketing of advertisements at [customers who]
14 fit specific parameters” through internet advertising partners like Meta and Google. *Id.* ¶¶ 34–35.

15 But Plaintiff has filed this class action lawsuit under California law against Twilio alone.
16 He asserts two claims under the CIPA for unauthorized wiretapping and eavesdropping, as well as
17 invasion of privacy claims under the California Constitution and California common law. *Id.*
18 ¶¶ 68–78 (CIPA claim under Cal. Pen. Code § 631(a)); *id.* ¶¶ 79–87 (CIPA claim under Cal. Pen.
19 Code § 632); *id.* ¶¶ 88–94 (invasion of privacy claims); *see also id.* ¶¶ 57–67 (class allegations).
20 In support of each of those claims, Plaintiff alleges that Keeps never disclosed it may share his
21 information with third-party vendors like Twilio for marketing and advertising purposes. *Id.* ¶ 6
22 (generally), ¶ 76 (CIPA wiretapping), ¶ 86 (CIPA eavesdropping) & ¶ 89 (invasion of privacy).

23 **C. Keeps broadly discloses in its Privacy Policy that it shares its customers’**
24 **information with third-party vendors for marketing and advertising.**

25 An essential component of Plaintiff’s theory of this case—the allegation that Keeps never
26 told him it would collect and share his information with third-party vendors like Twilio—is
27 demonstrably false. In its Privacy Policy, Keeps repeatedly and broadly disclosed that it collects,
28 aggregates, and shares information about its customers for marketing and advertising purposes.

1 First, in a section of the Privacy Policy entitled “**COLLECTION OF PERSONAL**
2 **INFORMATION**,” Keeps told Plaintiff that it may collect information about them from
3 numerous sources, including from customers themselves (*i.e.*, during account creation), internet
4 advertising companies like Meta and Google (*i.e.*, from other internet activity), and customers’
5 browsing activity on the Keeps website (*i.e.*, automatically through the use of browser cookies).
6 Kanig Decl. ¶ 3, Ex. A ¶ 2. The information that Keeps collects from these sources includes
7 their: (1) contact information; (2) account information; (3) financial information; (4) “personal
8 characteristics,” including “general medical history” and “other information relevant to diagnosis
9 and treatment”; (6) “personal preferences, including product preferences, online preferences, and
10 interests”; (7) “online behavior information including details of your visits to the Keeps website,
11 online activity, time spent viewing features, traffic data, location data, logs, language, date and
12 time of access, frequency, and other communication data”; and (8) device information. *Id.* ¶ 3.

13 Then, in the section entitled “**DISCLOSURE OF PERSONAL INFORMATION**,”
14 Keeps broadly disclosed that it may share this “personal information” with “third party vendors
15 and service providers that perform services and functions on our behalf . . . in order to provide
16 these services to us[.]” *Id.* ¶ 4. Keeps states in the “**ADVERTISEMENT**” section that it “may []
17 share your Personal Information with entities that assist us with marketing and advertising.” *Id.*
18 ¶ 8. And Keeps said that it “may use cookies and other information to provide relevant interest-
19 based advertising to you, and ad networks to which we belong may use your browsing activity
20 across participating websites to show you interest-based advertisements on those websites.” *Id.*

21 Thus, and contrary to the core of Plaintiff’s case, Keeps disclosed to its customers that it
22 may share their information with third-party vendors like Twilio for marketing and advertising in
23 its contract with Plaintiff. *See Compl.* ¶¶ 27–51. The question here is whether Plaintiff’s claims,
24 which turn on these disclosures in the Keeps Privacy Policy, must be resolved in arbitration.

25 **III. LEGAL STANDARD**

26 “[T]he Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements
27 in contracts involving interstate commerce[.]” *Herrera*, 104 F.4th at 706 (citing 9 U.S.C. § 1, *et*
28 *seq.*). It espouses a “liberal federal policy favoring arbitration[.]” *AT&T Mobility LLC v.*

1 *Concepcion*, 563 U.S. 333, 339 (2011). Thus, the FAA “mandates that . . . courts shall direct the
2 parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”
3 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

4 Because Plaintiffs’ purchase of men’s hair loss treatment from the Keeps website involves
5 interstate commerce, the FAA governs Plaintiff’s arbitration agreement. *See Duval v. Costco*
6 *Wholesale Corp.*, No. 22-CV-02338-TSH, 2023 WL 3852694, at *2 (N.D. Cal. June 5, 2023)
7 (holding that the FAA applies to sales on “a virtual marketplace through a smartphone application
8 or website”) (citing *United States v. Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) (“[T]he Internet
9 is an instrumentality and channel of interstate commerce.”)); *see also Citizens Bank v. Alafabco,
10 Inc.*, 539 U.S. 52, 56–57 (stating that the FAA applies whenever, “in the aggregate,” the activity
11 at issue “bear[s] on interstate commerce in a substantial way”). Indeed, because Plaintiff is a
12 California resident and Keeps is a New York resident, their agreement constitutes interstate
13 commerce in and of itself. *Bernsley v. Barclays Bank Del.*, 657 F. Supp. 3d 1327, 1337 (C.D.
14 Cal. 2023); Compl. ¶ 5 (Plaintiff’s residency); Kanig Decl., Ex. A ¶ 8 (Keeps’s residency).

15 Further, “a litigant who is not a party to an arbitration agreement may invoke arbitration
16 under the FAA if the relevant state contract law allows the litigant to enforce the agreement.”
17 *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013). “[S]tate law [may] allow a
18 contract to be enforced by or against nonparties to the contract through assumption, piercing the
19 corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and
20 estoppel.” *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *see also Mundi v. Union
21 Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) (“General contract and agency principles
22 apply in determining the enforcement of an arbitration agreement by or against nonsignatories.”).

23 Thus, the FAA governs Plaintiff’s arbitration agreement with Keeps, and Twilio is entitled
24 to enforce that arbitration agreement in this action to the extent that applicable state law permits.

25 **IV. ARGUMENT**

26 **A. Twilio is entitled to enforce Plaintiff’s individual arbitration agreement with
27 Keeps as a nonsignatory under California’s doctrine of equitable estoppel.**

28 When Plaintiff created his Keeps account in order to make his purchase, he was required

1 to agree to the Keeps Terms and the Keeps Privacy Policy. Jahn Decl. ¶ 2. In agreeing to the
2 Keeps Terms, Plaintiff agreed to individually arbitrate any dispute relating to his purchase from
3 Keeps, the Keeps Terms, the Keeps Privacy Policy, and his use of the Keeps website. *Id.* The
4 Keeps Terms include an arbitration provision and class waiver, as described above, that are valid
5 and enforceable under the FAA. Kanig Decl., Exs. D & E ¶¶ 17–18. This provision covers
6 “[a]ny dispute, claim, or controversy arising out of or relating in any way to these Terms; the . . .
7 enforcement, interpretation or validity thereof; . . . or your use of the Site, including products
8 purchased or Service rendered through the Site[.]” *Id.* ¶ 17. Such “broad and far reaching”
9 language covers this entire action, which arises out of Plaintiff’s use of the Keeps website. *See*
10 *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) (where the
11 “[r]esolution of the dispute would require an analysis of the [contract terms],” “[t]he dispute
12 unquestionably arises out of or relates to [its] construction”). Thus, there is no question that
13 Plaintiff entered into a valid and enforceable arbitration agreement that covers this lawsuit.

14 The only question is whether Twilio is entitled to enforce Plaintiff’s arbitration agreement
15 as a nonsignatory. Under California’s doctrine of equitable estoppel, the answer is yes.²
16 Equitable estoppel permits a nonsignatory defendant to enforce a signatory plaintiff’s arbitration
17 agreement in two circumstances. *Herrera*, 104 F.4th at 711 (citing *Goldman v. KPMG LLP*, 173
18 Cal. App. 4th 209, 221 (2009)). One is enough to compel arbitration, but both are present here.

19 **First**, Plaintiff’s claims are intertwined with the privacy rights and obligations set out in
20 the same contract with Keeps that contains the arbitration provision. Each claim depends on the
21 allegation that Keeps did not disclose that it would share customer information with third-party
22 vendors for marketing and advertising purposes. **Second**, Plaintiff’s pervasive allegations that
23 Keeps and Twilio colluded to violate his privacy are similarly intertwined with the privacy rights
24 and obligations set out in Plaintiff’s underlying contract with Keeps. Plaintiff cannot “bypass” or

25

² California law controls whether Twilio may enforce the arbitration agreement between Keeps
26 and Plaintiff under the doctrine of equitable estoppel, even though the Keeps Terms select New
27 York law to govern the agreement notwithstanding any applicable conflict-of-law principles. *See*
28 Kanig Decl. ¶ 6, Exs. D & E ¶ 16. This is because applying New York law on equitable estoppel
would presuppose that Twilio can enforce Keeps’s choice-of-law clause, which itself requires an
equitable estoppel analysis. *In re Henson*, 869 F.3d 1052, 1058–61 (9th Cir. 2017) (holding that
California’s law of equitable estoppel governs instead of selected New York law in this situation).

1 “sidestep[]” his agreement to individually arbitrate this dispute under New York law by tactically
2 suing Twilio in a class action under California law. *See Franklin*, 998 F.3d at 875; *Young*, 700 F.
3 Supp. 3d at 814. This implicates the “linchpin” of equitable estoppel: fairness. *See Herrera*, 104
4 F.4th at 710.

5 **1. Plaintiff’s claims are intertwined with his contract with Keeps because
6 they require interpretation and enforcement of its Privacy Policy.**

7 Twilio is entitled to enforce Plaintiff’s arbitration agreement with Keeps because his
8 claims against Twilio are “intimately founded in and intertwined with” the privacy rights and
9 obligations that are set out in that same agreement. *See Herrera*, 104 F.4th at 711. To conduct
10 this inquiry, courts must look to “the relationships of persons, wrongs and issues” alleged in the
11 complaint, *regardless* of whether the plaintiff references the underlying contract containing the
12 arbitration agreement. *Franklin*, 998 F.3d at 871. The purpose of “examining the facts alleged in
13 the complaint” in this manner is to determine “whether they *rely or depend on* the terms, duties,
14 or obligations in the contract containing the arbitration provision in asserting the claims.” *In re
15 Pac. Fertility Ctr. Litig.*, 814 F. App’x 206, 209 (9th Cir. 2020) (emphasis added). It does not
16 matter if some of those allegations do not rely or depend on the underlying contract. “California
17 law does not require that every allegation in the complaint be intertwined with the contract
18 containing the arbitration clause for equitable estoppel to apply.” *Herrera*, 104 F.4th at 710.
19 Under this framework, Plaintiff’s claims are plainly intertwined with his contract with Keeps.

20 **a. Plaintiff’s privacy claims require him to prove that Keeps did
21 not disclose that it may share his information with Twilio.**

22 Each of Plaintiff’s privacy claims require him to prove that Keeps did not disclose that it
23 may share the information it collected about him with third-party vendors and service providers
24 like Twilio. *First*, to succeed on a CIPA claim for intentional wiretapping, a plaintiff must prove
25 that the defendant has made an “*unauthorized* connection” with a “telegraph or telephone wire”
26 or has attempted to read or learn the contents of a communication “*without the consent* of all
27 parties.” Cal. Pen. Code § 631(a) (emphases added); *accord Google Assistant*, 457 F. Supp. 3d at
28 828 (an element of a wiretapping claim is the lack of authorization or consent from all parties).

1 **Second**, to succeed on a CIPA claim for eavesdropping, a plaintiff must similarly prove
2 that the defendant has, “without the consent of all parties to a confidential communication,” used
3 an “electronic amplifying or recording device” to “eavesdrop” on the communication. Cal. Pen.
4 Code § 632. This claim thus requires proof that the eavesdropping was done in secret, without
5 the plaintiff’s knowledge. *See Thomasson v. GC Services Ltd. P’ship*, 321 Fed. App’x. 557, 559
6 (9th Cir. 2008) (“California courts interpret ‘eavesdrop,’ as used in § 632, to refer to a third party
7 secretly listening to a conversation between two other parties”); *Brown v. Google LLC*, 525 F.
8 Supp. 3d 1049, 1073 (N.D. Cal. 2021) (“A communication is confidential under Section 632 if a
9 party ‘has an objectively reasonable expectation that the conversation is not being overheard or
10 recorded.’”) (quoting *Flanagan v. Flanagan*, 27 Cal. 4th 766, 776–77 (2002)).

11 And **third**, to succeed on an invasion of privacy claim under the California Constitution or
12 the common law, a plaintiff must prove that (1) he had a reasonable expectation of privacy and
13 (2) the defendant intruded on that privacy in a highly offensive manner. *Hernandez v. Hillsides*,
14 Inc., 47 Cal. 4th 272, 286 (2009). Critically, whether a reasonable expectation of privacy exists
15 and whether an intrusion into that privacy is highly offensive depends on whether the intrusion
16 was disclosed to the plaintiff. *Hammerling*, 2024 WL 937247, at *3 (holding that the disclosure
17 of a challenged data practice defeats California invasion of privacy claims as a matter of law).

18 Accordingly, Plaintiff alleges in support of each of his privacy claims that he did not
19 know, consent, or authorize Keeps to share his information with third-party vendors like Twilio
20 for marketing and advertising purposes. Compl. ¶¶ 6 (generally), 76 (CIPA Section 631 claim),
21 86 (CIPA Section 632 claim), 89 (invasion of privacy claims). Thus, it is beyond argument that
22 Plaintiff's privacy claims each depend on the issue of disclosure, consent, and authorization.

b. The Keeps Privacy Policy speaks to whether Keeps may share information with third parties for advertising and marketing.

Having reviewed Plaintiff's complaint, the inquiry turns to Plaintiff's contract. That contract—composed of the Keeps Terms and the Keeps Privacy Policy—sets out in detail its customers' privacy rights and Keeps's privacy obligations. Kanig Decl. ¶¶ 2–6 & Exs. A–C (Keeps Privacy Policy) & Exs. D–E (Keeps Terms); *see also* Jahn Decl. ¶¶ 2–3.

1 Keeps informed its customers that it may share their “personal information” with “third
2 party vendors and service providers that perform services and functions on our behalf . . . in order
3 to provide these services to us[.]” *Id.*, Exs. A–C ¶ 4. Keeps also expressly disclosed that this
4 personal information may include: (1) contact information; (2) “personal characteristics,”
5 including “general medical history” and “other information relevant to diagnosis and treatment”;
6 (3) “personal preferences, including product preferences, online preferences, and interests”; and
7 (4) “online behavior information including details of your visits to the Keeps website.” *Id.* ¶ 3.

8 The Keeps Privacy Policy does not place limits on the third-party vendors and service
9 providers to which Keeps may send this information. *See id.* Keeps also discloses that it “may []
10 share your Personal Information with entities that assist us with marketing and advertising.” *Id.* ¶
11 8. And it discloses that “ad networks to which we belong may use your browsing activity across
12 participating websites to show you interest-based advertisements on those websites.” *Id.*

13 Thus, the Keeps Privacy Policy provides that Keeps may collect and share with third
14 parties personal information about its customers for marketing and advertising purposes.

15 c. **Decisional law confirms that Plaintiff’s privacy claims are thus
16 intertwined with the terms set out in the Keeps Privacy Policy.**

17 This intertwinement of Plaintiff’s privacy claims and the privacy rights and obligations set
18 out in the Keeps Privacy Policy—part of the contract containing his arbitration agreement—
19 entitles Twilio to enforce Plaintiff’s arbitration agreement in this action. To make a sufficient
20 showing of intertwinement, Twilio need demonstrate only that this Court would have to interpret
21 the disclosures set out in the Keeps Privacy Policy in order to adjudicate the dispute between
22 Plaintiff and Twilio. *See Herrera*, 104 F.4th at 711; *Franklin*, 998 F.3d at 871; *Pac. Fertility*, 814
23 F. App’x at 209. As shown above, this is necessary here. Plaintiff cannot succeed on any of his
24 privacy claims if the Keeps Privacy Policy discloses that Keeps may share his personal
25 information with third-party vendors like Twilio for marketing and advertising purposes. Indeed,
26 Plaintiff’s claims cannot be evaluated or understood without the context of the data-usage
27 disclosures in the Keeps Privacy Policy. Thus, Twilio is entitled to enforce the Keeps arbitration
28 agreement against Plaintiff in this lawsuit under the first circumstance of equitable estoppel.

1 Decisional law from this District confirms that intertwinement exists here. Recently, in
2 *Hunt v. Meta Platforms*, the court granted Meta and Google’s motions to compel individual
3 arbitration on equitable estoppel grounds in a materially identical situation. *See* 2024 WL
4 2503118, at *1–3. There, the plaintiff alleged that H&R Block (an online tax-preparation service)
5 contracted with Meta and Google (internet advertisers) to trick its customers into providing their
6 personal information to H&R Block on its website so that it could be secretly shared with Meta
7 and Google for advertising purposes. *Id.* at *1. The plaintiff asserted civil RICO claims against
8 all three companies, including predicate wire-fraud claims. *Id.* at *1–2. The merits of those fraud
9 predicates turned on whether H&R Block had disclosed to its customers in its Privacy Policy that
10 it could share their information with third parties like Meta and Google. *Id.* at *2.

11 Meta and Google moved to enforce the plaintiff’s arbitration agreement with H&R Block
12 on equitable estoppel grounds, arguing, just as here, that the plaintiff’s claims were intertwined
13 with the disclosures in the H&R Block Privacy Policy. *Id.* The court agreed in full. Because the
14 plaintiff’s claims required him to prove that H&R Block’s Privacy Policy did not disclose that
15 H&R Block could share his personal information with Meta and Google, “[the plaintiff’s] claims
16 against Google and Meta by their own terms are closely intertwined with his agreement with
17 H&R Block.” *Id.* at 2. It did not matter that the plaintiff did not formally allege a breach of the
18 agreement, or that his claims arose from statute. Instead, “the question under California law is
19 whether the claims ‘are in *any way* founded in or bound up with the terms.’” *Id.* at *3 (quoting
20 *Herrera*, 94 F.4th at 1090–91). “[B]ecause the [plaintiff’s] claims allege fraud arising from the
21 H&R Block agreements as one of the elements of his RICO claims, those claims are intimately
22 intertwined with the H&R Block agreements (including the incorporated privacy notice).” *Id.*

23 Similarly instructive is *Uptown Drug Company v. CVS Caremark Corporation*. *See* 962
24 F. Supp. 2d 1172, 1184 (N.D. Cal. 2013). There, the plaintiff, which provided pharmacy services
25 through certain healthcare plans, was a competitor of CVS, which provided pharmacy services at
26 retail stores. *Id.* at 1176. CVS merged with Caremark, a pharmacy services intermediary, which
27 had a business relationship with the plaintiff that was subject to a contract containing an
28 arbitration provision. *Id.* Following the merger, the plaintiff came to believe that Caremark

1 disclosed its trade secret customer information to CVS without authorization. *Id.* The plaintiff
2 sued several CVS entities for trade secret misappropriation, unfair competition, and tortious
3 interference. *Id.* The CVS entities that had signed the contract moved to compel arbitration. *Id.*

4 The CVS entities that did not sign the contract also moved to compel arbitration on
5 equitable estoppel grounds. *Id.* at 1183. These nonsignatories argued that the plaintiff's claims
6 were intertwined with its contract with Caremark because that contract "expressly addresses the
7 use, dissemination, and ownership of the customer information" at issue. *Id.* at 1184. The court
8 agreed. To determine whether intertwinement existed, the court first looked to the elements of
9 the plaintiff's claims and then the terms of the plaintiff's contract. *See id.* at 1185. The court
10 found that all but one of the plaintiff's claims required interpretation of the terms in that contract.
11 In short, "The question of whether Caremark was to any extent barred from disclosing or using
12 [the plaintiff's] customer data must be answered by looking at the terms of the [contract] because
13 that contract explicitly governs the collection and use of such information and because it provides
14 the underlying basis for [the plaintiff's] disclosure of such information." *Id.* at 1185. Thus, these
15 claims were plainly intertwined with the contract and equitable estoppel was appropriate.³ *Id.*;
16 *see also Airtourist Holdings LLC v. HNA Grp.*, No. C 17-04989 JSW, 2018 WL 3069444, at *3
17 (N.D. Cal. Mar. 27, 2018) (compelling arbitration because "the claims in the complaint are
18 premised upon the construction of the terms and foundational agreements" with the plaintiff).

19 Here, just as in *Hunt* and *Uptown Drug*, Plaintiff's claims are intertwined with the terms
20 and duties set out in his contract with Keeps and therefore should be compelled to arbitration.

21 **2. Plaintiff's allegations that Keeps and Twilio colluded to invade his
22 privacy are similarly intertwined with the Keeps Privacy Policy.**

23 Twilio is also entitled to enforce Plaintiff's arbitration agreement with Keeps on equitable
24 estoppel grounds because Plaintiff alleges concerted misconduct between Twilio and Keeps that
25 is similarly intertwined with the privacy rights and obligations in the Keeps Privacy Policy. *See*
26 *Hunt*, 2024 WL 2503118, at *3; *see also Herrera*, 104 F.4th at 711. This second circumstance of

27 ³ In *CVS Caremark*, the court held that the plaintiff's unfair prong claim under the UCL was not
28 intertwined with his Caremark contract because it was predicated on unfair business practices that
had no relationship at all with the "rights or duties" set out in that contract. *Id.*

1 equitable estoppel exists where a plaintiff alleges a signatory and nonsignatory have acted “jointly
2 in furtherance of a common scheme,” and the legality of that scheme cannot be resolved without
3 looking to the terms of the plaintiff’s contract. *See Sanders v. Swift Transp. Co. of Arizona, LLC*,
4 843 F. Supp. 2d 1033, 1038 (N.D. Cal. 2012) (compelling arbitration on this basis). Where the
5 signatory is the “principal wrongdoer,” in that it initiated and organized the common scheme with
6 the nonsignatory, estoppel is particularly appropriate. *See Carter v. Spiegel*, No. 21-CV-03990-
7 TSH, 2022 WL 126303, at *6 (N.D. Cal. Jan. 13, 2022) (compelling arbitration on this basis).

8 The core theory of Plaintiff’s case is that Keeps colluded with Twilio to secretly collect
9 and use Keeps customer information for their mutual profit. *See* Compl. ¶ 3 (“[Twilio] contracts
10 with Keeps to enable the conduct at issue.”); *id.* ¶¶ 27–51 (alleging how Keeps installed Twilio’s
11 software on the Keeps website so that Keeps could send customer information to Twilio); *id.* ¶ 56
12 (alleging that “the agreement for [Twilio] to wiretap [Keeps’s customers’] communications on the
13 [Keeps] Website is done for the purpose of improperly increasing the advertising efficacy and, by
14 extension, profits of both parties”). Plaintiff’s complaint is thus replete with allegations that
15 Keeps and Twilio acted “jointly in furtherance of a common scheme” to profit from his customer
16 information. *See Sanders*, 843 F. Supp. 2d at 1038. Indeed, it would have been impossible for
17 Twilio to engage in the conduct that Plaintiff alleges without Keeps, which is the party that hired
18 Twilio as a vendor, installed Twilio’s software on its website, made the relevant disclosures in its
19 Privacy Policy, and collected its customers’ information. For that same reason, Twilio cannot be
20 the “principal wrongdoer” described in this case. *See Carter*, 2022 WL 126303, at *6. Twilio is
21 merely a third-party vendor that provided Keeps with a lawful software service.

22 These are precisely the kind of allegations of concerted misconduct that warrant equitable
23 estoppel. For example, in *Salas v. Universal Credit Services, LLC*, the plaintiff enrolled in a debt
24 settlement program with defendant Priority, pursuant to a contract with an arbitration provision.
25 2019 WL 1242448, at *1. Even though that contract “authorized” Priority to share the plaintiff’s
26 credit report with third parties to perform its services, the plaintiff sued it and several such third
27 parties under credit reporting statutes. *Id.* at *4. The nonsignatories moved to compel arbitration,
28 and the court granted their motions. *Id.* The allegations of “interdependent conduct” regarding

1 the defendants' sharing of his credit report were "intimately connected to the obligations" set out
2 in his contract because it addressed whether they could do so. *Id.* Further, it was "clear that all of
3 the [d]efendants will rely on the [contract's disclosure] as a defense for their actions." *Id.*

4 Similarly, in *Coinmint v. DX Corr Design*, the plaintiff alleged that it was fraudulently
5 induced into purchasing Bitcoin mining rigs from a nonparty (Katena) that it never received. *See*
6 No. 23-CV-00599-RS, 2023 WL 9595893, at *1 (N.D. Cal. Apr. 24, 2023). The plaintiff initiated
7 arbitration against Katena under their purchase agreement, but also sued several nonsignatories,
8 including DX Corr (a third-party computer chip design company), DX Corr's owner, and several
9 of its own employees, who all allegedly conspired to enable the fraudulent scheme. *Id.* The court
10 granted the nonsignatory defendants' motion to compel arbitration on equitable estoppel grounds,
11 finding that these conspiracy allegations were "grossly intertwined" with the plaintiff's claims,
12 given the prevalence of allegations about the non-party signatory's misconduct. *Id.* at *3–4. "Far
13 more than allegations of parallel misconduct resulting in discrete injuries to Plaintiff[],"
14 "Plaintiff[] allege[s] a single scheme to achieve a single aim." *Id.* at *4. The same is true here.

15 Finally, in *Hunt v. Meta Platforms*, also discussed above, the court similarly found that the
16 plaintiff had "alleged concerted misconduct" between H&R Block, Meta, and Google that was
17 "undoubtedly connected to [his] underlying agreement with H&R Block[.]" 2024 WL 2503118,
18 at *3. But because the court had already granted Meta and Google's arbitration motions on
19 intertwinement grounds, it did not need to reach this further basis for equitable estoppel. *Id.*

20 **B. The Court should stay this action pending resolution of arbitration.**

21 Finally, Twilio requests a mandatory stay of this action pending resolution of individual
22 arbitration. "When a district court finds that a lawsuit involves an arbitrable dispute, and a party
23 requests a stay pending arbitration, § 3 of the FAA compels the court to stay the proceeding." *See*
24 *Smith v. Spizzirri*, 601 U.S. 472, 478 (2024) (discussing 9 U.S.C. § 3). Thus, a stay is proper.

25 **V. CONCLUSION**

26 For the foregoing reasons, Twilio respectfully requests that this Court grant its motion to
27 compel individual arbitration and stay this action pending resolution of that individual arbitration.

28 ///

1 Dated: August 19, 2024

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